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In The

Supreme Court of the United States

GARY EBECK,

Petitioner,

v.

BILL HEDRICK, Warden, United States Medical Center for Federal Prisoners,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether 28 U.S.C. § 2241 provides a remedy to a habeas petitioner who has exhausted his remedies under 28 U.S.C. § 2255 and is illegally detained on a federal offense for which the United States has conceded the total absence of evidence to support a necessary element.

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The Petition for Rehearing by the Panel with Suggestions for Rehearing *En Banc* was denied by the Eighth Circuit Court of Appeals on December 16, 2002. The September 5, 2002, Panel Opinion of the United States Court of Appeals for the Eighth Circuit affirming the denial of the application for certificate of appealability is not reported and appears in the Appendix to this Petition at App. 1A. The decision of the district court denying the application for certificate of appealability is not reported and appears at App. 12A. *Gary Ebeck v. Bill Hedrick, Warden, et al.*, Case No. 01-3149-CV-S-4-H (W.D. Mo. June 3, 2002). The district court's order adopting the Report and Recommendation of the Magistrate Judge issued on April 8, 2002, is not reported and appears at App. 9A. *Gary Ebeck v. Bill Hedrick, Warden, et al.*, Case No. 01-3149-CV-S-4-H (W.D. Mo. April 8, 2002). The Report and Recommendation issued by the Magistrate Judge on December 5, 2001, is not reported and appears at App. 2A. *Gary Ebeck v. Bill Hedrick, Warden, et al.*, Case No. 01-3149-CV-S-4-H (W.D. Mo. December 5, 2002).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its denial of a Certificate of Appealability on September 5, 2002. The Petition for Rehearing by the Panel with Suggestions for Rehearing *En Banc* was denied on December 16, 2002. Under Supreme Court Rule 13.1, the Petition for Writ of Certiorari was due on March 10, 2003. Petitioner filed a Motion for Extension of Time of sixty (60) days in which to file his Petition for Writ of Certiorari pursuant to United Supreme Court Rules 13.5,

22 and 30. On February 27, 2003, Justice Thomas extended the time within which to file the Petition for Writ of Certiorari to, and including, May 9, 2003. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V to the Constitution of the United States is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 255 of Title 40 states in relevant part as follows:

. . .

> Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he

> may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

Section 2241 of Title 28 states in relevant part as follows:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

. . . .

Section 2255 of Title 28 states in relevant part as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to the collateral attack, may move the

court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that

the remedy by motion is inadequate or ineffective to test the legality of his detention.

. . . .

Section 1201 of Title 18 states in relevant part as follows:

> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when –
>
> (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary if the person was alive when the transportation began;
>
> (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
>
> (3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;
>
> (4) the person is a foreign official, an international protected person, or an official guest as those terms are defined in section 1116(b) of this title; or
>
> (5) the person is among those officers and employees described in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties;

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

. . . .

Missouri Revised Statute section 12.025 (1994) stated as follows:

> **12.025. Jurisdiction ceded to United States within Ozark National Scenic Riverways, and certain other property, exceptions.** – 1. Jurisdiction concurrent with that of the state of Missouri in and over land which is now, or may hereafter be, owned and used by the United States as an honor farm in connection with the operation of a federal penitentiary is hereby ceded to the United States for so long as the United States shall own and so use the land.
>
> 2. Jurisdiction concurrent with that of the state of Missouri is hereby ceded to the United States within the area comprising the "Ozark National Scenic Riverways" for so long as this area is administered and maintained by the United States.
>
> 3. Provided that no part of this section shall apply to the White River watershed.
>
> 4. Provided further that no part of this section shall apply to the Osage and St. Francois River watersheds.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On January 5, 1994, Mr. Ebeck pled guilty to a violation of the federal kidnaping statute, 18 U.S.C. § 1201(a)(2) and one count of using firearms in relation to a felony crime of violence in violation of 18 U.S.C. § 924(c). The district court sentenced Mr. Ebeck to 240 months on Count I and 60 months on Count II, to be served consecutively. The sentence was affirmed on appeal by the Eighth Circuit Court of Appeals. *United States v. Ebeck*, 1994 U.S. App. LEXIS 2131 (8th Cir. Aug. 12, 1994). Following his cooperation with the federal authorities, Mr. Ebeck obtained a reduction of his sentence to 240 months. Mr. Ebeck has filed numerous petitions and motions in pursuit of habeas relief since the discovery of credible evidence bearing on the federal jurisdiction of the situs of his crime, a necessary element under 18 U.S.C. § 1201(a)(2).

Mr. Ebeck did not first discover the lack of federal jurisdiction until seven years after his conviction and after a number of procedural steps in his habeas proceedings had already taken place. Notably, in a pleading filed in the district court by the United States in its Response to Petitioner's Reply Suggestions in Support of Petition Filed Pursuant to 28 U.S.C. § 2241, it stated that:

> [T]he United States must concede that the site of the crime was not under the 'territorial jurisdiction of the United States' within the meaning of 18 U.S.C. § 1201(a)(2) and 18 U.S.C. § 7(3). While ownership of the land conferred proprietary jurisdiction, the statutorily prescribed steps to obtain 'legislative' jurisdiction were not taken.

The conceded lack of federal jurisdiction shows that Mr. Ebeck is factually innocent of the federal crime of kidnaping under 18 U.S.C. § 1201 because a statutory element of the crime includes that its commission be on federal property which is within the exclusive or concurrent jurisdiction of the United States.

On April 4, 1997, upon the discovery of this glaring error, Mr. Ebeck promptly filed a second § 2255 motion alleging, for the first time, that the district court of the United States lacked subject matter jurisdiction and was without power to try, convict or sentence him, because the missing statutory element would rob the court of jurisdiction. On July 24, 1997, the district court denied Mr. Ebeck's second § 2255 motion based on procedural grounds because he did not file a certificate of appealability as required. On August 4, 1997, Mr. Ebeck filed a motion for reconsideration and to alter the July 24, 1997, order. On August 21, 1997, the district court denied Mr. Ebeck's motion for reconsideration. On September 22, 1997, Mr. Ebeck filed an application for a certificate of appealability from the district court's decision of July 24, 1997, denying his second § 2255 motion. On September 30, 1997, the district court denied the application for certificate of appealability. At no time did any court address the merits Mr. Ebeck's claim.

Mr. Ebeck appealed this decision to the United States Court of Appeals for the Eighth Circuit. Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, his notice of appeal was treated as an application for certificate of appealability. On November 14, 1997, a three-judge panel of the Eighth Circuit Court of Appeals denied Mr. Ebeck's application for appeal of certification and ordered the appeal dismissed. Mr. Ebeck then filed a petition for

rehearing of the Eighth Circuit's order denying a certificate of appealability and suggestions for rehearing *en banc* on December 29, 1997. On February 6, 1998, the Eighth Circuit *en banc*, denied Mr. Ebeck's petition for rehearing.

On March 9, 1998, Mr. Ebeck filed a motion pursuant to 28 U.S.C. § 2241, claiming actual innocence of the charge for which he had been incarcerated based on the fact that the United States lacked jurisdiction over the situs of the crime. Mr. Ebeck filed this motion in the United States Court for the Central District of Illinois. On March 20, 1998, the United States Court for the Central District of Illinois construed his § 2241 motion as a second, or successive, § 2255 motion and transferred the motion to the sentencing court which also construed it as a successive § 2255 and denied it on procedural grounds on March 27, 1998, without ruling on the merits of the jurisdictional claim.

Mr. Ebeck, on May 29, 1998, filed in the district court a motion under Federal Rule of Civil Procedure 60(b), alleging that he had not authorized or signed the first § 2255 motion and that the court lacked jurisdiction to convict or sentence him. On July 17, 1998, the district court, treating the Rule 60(b) motion as the functional equivalent of a § 2255 motion, denied it noting that the Eighth Circuit Court of Appeals had not certified the motion as required by 28 U.S.C. § 2255. A subsequent motion for reconsideration was denied on August 10, 1998. Barred by procedural technicalities, the merits of Mr. Ebeck's claim were never addressed.

Mr. Ebeck appealed the district court's finding regarding the Rule 60(b) motion to the Eighth Circuit Court of Appeals. On October 1, 1998, by letter, the Eighth Circuit

remanded the case back to the district court so that the district court could specify the issue which Mr. Ebeck could raise on appeal in light of the decision in *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997). The district court, in an order dated October 6, 1998, stated that the defendant had not made a request for certificate of appealability with either the district court or the court of appeals. The district court also affirmed its determination that the Rule 60(b) motion should be treated as the "functional equivalent of an application for a second writ of habeas corpus when it raises the issue of a post-conviction relief nature." The district court denied Mr. Ebeck's request for a certificate of appealability, never addressing the merits of Mr. Ebeck's claim.

The Eighth Circuit, on February 24, 1999, granted Mr. Ebeck's application for certificate of appealability on the issue of the district court's characterization of his Rule 60(b) motion as a § 2255 motion. On May 25, 1999, Mr. Ebeck filed his brief with the Eighth Circuit Court of Appeals. The court determined that oral argument would not be necessary, and on November 23, 1999, the court affirmed the district court's denial of Mr. Ebeck's Rule 60(b) motion. Mr. Ebeck's request for reconsideration was also denied. Mr. Ebeck then filed an Application For Leave to File a Second or Successive § 2255 Motion on August 28, 2000, in order to bring the jurisdictional issues before the court, but this application was summarily denied on November 2, 2000, without any elaboration by the court on the merits of Mr. Ebeck's claims.

On April 2, 2001, Mr. Ebeck filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 on the grounds that the remedies provided by 28 U.S.C. § 2255 were "inadequate or ineffective to test the legality of his

detention." The matter was referred to a Magistrate so that a Report and Recommendation could be issued. In fact, in a pleading filed in the district court by the United States in its Response to Petitioner's Reply Suggestions in Support of His Petition Filed Pursuant to 28 U.S.C. § 2241, the Government stated that they "must concede that the site of the crime was not under 'territorial jurisdiction of the United States.'"

On December 5, 2001, the Magistrate issued the Report and Recommendation finding that the argument was one of legal insufficiency rather than factual innocence and should be treated as a successive § 2255 motion; never addressing the merits of Mr. Ebeck's claims. On January 11, 2002, Mr. Ebeck filed objections to the report and recommendations of the Magistrate. On April 8, 2002, the district court overruled Mr. Ebeck's objections to the report and recommendation, adopted the Magistrate's Report and dismissed the writ of habeas corpus without prejudice. On April 18, 2002, Mr. Ebeck then filed a Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e). On April 30, 2002, the district court denied Mr. Ebeck's motion.

On May 6, 2002, Mr. Ebeck filed a Notice of Appeal with the Eighth Circuit Court of Appeals, appealing both the Order denying his motion to alter or amend the judgment and the order dismissing the Writ of Habeas Corpus. On May 8, 2002, Mr. Ebeck also filed an Application for Certificate of Appealability pursuant to 28 U.S.C. § 2253(c) in the district court. On June 3, 2002, the district court denied his Application for Certificate of Appealability. On September 5, 2002, the Eighth Circuit Court of Appeals denied the Certificate of Appealability and subsequently dismissed the pending appeal. On November 4, 2002, Mr.

Ebeck filed a Petition for Rehearing by the panel with Suggestion for Rehearing *En Banc*. On December 10, 2002, the petition for rehearing was denied by the Eighth Circuit Court of Appeals. Mr. Ebeck's petition for writ of certiorari is timely filed in this Court on or before May 9, 2003.

Since the beginning of the labyrinthian maze of motions and procedural hurdles, Mr. Ebeck's claim has never been examined on its merits either by the granting of an evidentiary hearing or through any of the courts from which Mr. Ebeck has sought relief.

II. FACTUAL HISTORY

On January 5, 1994, Mr. Ebeck pled guilty to a violation of the federal kidnaping statute, 18 U.S.C. § 1201(a)(2). After Mr. Ebeck's plea of guilty, newly discovered evidence was found through the efforts of his daughter Debbie Dobbs (hereinafter, "Dobbs"). Dobbs originally became involved in investigating certain legal matters for her father. Approximately June 23, 1997, Dobbs began investigating the issue of whether the crime charged to Mr. Ebeck was committed on federal property.

Ms. Dobbs traveled to Jefferson City, Missouri, on at least two occasions after Mr. Ebeck was sentenced. On the first occasion, Dobbs researched records held within the office of the Missouri Secretary of State, an agency administered by Robin Cook (hereinafter, "Cook"), in order to locate any certification showing that the situs of the crime, also known as "White River Watershed," was ceded to the United States. On the second occasion, Dobbs met with Cook directly and her office provided a letter dated June 23, 1997, and a copy of R.S. Mo. § 12.025. The records

revealed the situs had never been ceded to the United States. Dobbs made over thirty phone calls to the United States Army Corps of Engineers, particularly through its Arkansas office, to verify that the situs had never been ceded to the United States. Lastly, Dobbs made a request through the Freedom of Information Act and was informed that the situs had never been ceded to the United States.

These facts were not fully discovered until after Mr. Ebeck had filed his original Petition pursuant to 28 U.S.C. § 2255. In a pleading filed in the district court by the United States, the Government stated in its Response to Petitioner's Reply Suggestions in Support of Petition Filed Pursuant to 28 U.S.C. § 2241:

> ... **[T]he United States must concede that the site of the crime was not under the 'territorial jurisdiction of the United States'** within the meaning of 18 U.S.C. § 1201(a)(2) and 18 U.S.C. § 7(3). While ownership of the land conferred proprietary jurisdiction, the statutorily prescribed steps to obtain 'legislative' jurisdiction were not taken.

(emphasis added)

This evidence shows that Mr. Ebeck is factually innocent of the federal crime of kidnaping under 18 U.S.C. § 1201(a)(2) because a statutory element of the crime includes its commission on federal property which is within the exclusive or concurrent jurisdiction of the United States. This element is wholly lacking in Mr. Ebeck's case. Mr. Ebeck remains illegally detained under a sentence of conviction which the district court could not

render because a crucial statutory element – federal jurisdiction – was glaringly absent.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT AND THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN DENYING PETITIONER EBECK'S APPLICATION FOR CERTIFICATE OF APPEALABILITY AND THE DISTRICT COURT ERRED IN DISMISSING PETITIONER EBECK'S PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

The district court and the Eighth Circuit Court of Appeals erred in denying Mr. Ebeck's Application for Certificate of Appealability claiming that Mr. Ebeck had failed to present a claim of factual innocence and had failed to establish that the provisions of 28 U.S.C. § 2255 were inadequate or ineffective to test the legality of his detention. Further, the district court erred in dismissing Mr. Ebeck's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 by re-characterizing the petition as a successive § 2255 petition. The district court adopted the Magistrate's Report and Recommendation, which found that Mr. Ebeck's claim should be construed as a successive petition under § 2255. App. at A10. Hence, since Mr. Ebeck's claim was essentially one of lack of subject matter jurisdiction, the Magistrate Judge concluded it was not a proper argument to be raised in a successive habeas petition filed under the AEDPA. App. at A10.

The Report and Recommendation also incorrectly termed Mr. Ebeck's argument as one of legal insufficiency, rather than a claim of factual innocence and stated that

"he had presented no proof that he is actually innocent of the crime." App. at A7. This decision is contrary to this Court's opinion in *Bousley v. United States*, 118 S.Ct. 1604 (1998) which upheld the principle that a petitioner who can demonstrate his actual innocence can overcome procedural defaults because the unjust and wrongful detention of an inmate who is actually innocent of the crime for which he is incarcerated constitutes a fundamental miscarriage of justice.

The district court erroneously concluded that Mr. Ebeck has somehow failed to establish a claim of "factual innocence." This is simply not true. The Government conceded that an essential element of the federal offense of kidnaping is wholly lacking. This is not a claim of mere "legal insufficiency." As there is a complete failure of federal jurisdiction, there can be no commission of a federal crime. *United States v. Lurie*, 207 F.3d 1075 (8th Cir. 2000), left open the door as to whether a claim of actual innocence, discovered after the filing of a § 2255 petition, may serve as a basis for establishing that the remedy under § 2255 is "inadequate or ineffective," thereby leaving the argument that a claim of factual innocence may be sufficient to permit a petitioner to rely on 28 U.S.C. § 2241.

However, *Martin v. Perez*, 319 F.3d 799 (6th Cir. 2003), contained facts almost exactly parallel to the case at bar. In *Martin*, the defendant was convicted of federal bombing charges under 18 U.S.C. § 844(i). *Martin v. Perez*, 319 F.3d 799, 801 (6th Cir. 2003). Martin appealed his conviction on the grounds that "his conduct did not constitute a federal offense because there was not a sufficient nexus between his conduct and interstate commerce . . . " *Id.* However, after several attempts at filing habeas petitions pursuant to

§ 2255 and certificates of appealability pursuant to 28 U.S.C. § 2253(c)(2), all of which were denied based on various procedural technicalities, he filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. *Id.* at 802.

Martin maintained that he could not be guilty of a federal bombing statute because he bombed a private residence which would not have established the necessary nexus to interstate commerce. *Id.* at 804. The Sixth Circuit found that "[i]f . . . [the residence was a private residence] . . . , then Martin is correct in his claim that he is factually innocent of violation of the arson statute." *Id.* Upon such a finding, the court held that "Martin . . . [had] satisfied the requirement of the savings clause. He is entitled to a hearing under Section 2241." *Id.*

The facts of Mr. Ebeck's case are strikingly similar. Mr. Ebeck, as Mr. Martin, pled guilty to a federal crime after which it was determined that the United States Government could not prove a requisite statutory element: that the crime was committed on property that the federal government retained jurisdiction and a necessary nexus to interstate commerce, respectively. In this situation, the Sixth Circuit utilized the language from the opinion in *Bousley v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) where the court stated " 'It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency.' " *Martin*, 319 F.3d at 804.

In *Martin*, the court found that the government's inability to prove the necessary statutory element that there be a nexus to interstate commerce was a claim of factual innocence – not legal insufficiency. Mr. Ebeck's

situation is identical to that in the case of *Martin*. By the United States conceding that it never obtained jurisdiction over the situs of where the crime was committed, a necessary statutory element was absent and cannot be proven through any showing of evidence. Therefore, the district court and the Eighth Circuit Court of Appeals were incorrect in characterizing Mr. Ebeck's claim as one of legal insufficiency instead of the correct label of factual innocence.[1]

Further, both the district court and the Eighth Circuit incorrectly ruled that this Court's decision in *Calcano-Martinez v. Immigration and Naturalization Service*, 121 S.Ct. 2268 (2001) and *Immigration and Naturalization Service v. St. Cyr*, 121 S.Ct. 2271 (2001) were "inapposite" to Mr. Ebeck's case. App. at A11. In actuality, these two recent decisions affirmed that § 2241 remains a remedy to challenge illegal detention when no other remedy is available. Although the Antiterrisom and Effective Death Penalty Act has restricted the availability of habeas relief, it cannot constitutionally strip courts of the ability to address claims under 28 U.S.C. § 2241 when an inmate is being confined on a federal sentence despite a complete and *conceded* lack of *federal* jurisdiction. Based on the

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[1] The Tenth Circuit Court of Appeals in *Boyce v. Ashcroft*, 251 F.3d 911 (10th Cir. 2001), stated that "the essential nature of all § 2241 actions is a challenge to federal custody." *Boyce v. Ashcroft*, 251 F.3d 911, 917 (10th Cir. 2001), *vacated as moot* 268 F.3d 953 (10th Cir. 2001) (citations omitted). " . . . [A]n inmate may invoke Section 2241 to challenge a sovereign's authority to detain him under any circumstances. *Id.* at 918. "The fundamental purpose of a Section 2241 proceeding . . . [is] an attack by a person in custody and . . . that the traditional function of the writ is to secure release from illegal custody." *Id.* at 917.

district court and Eighth Circuit Court of Appeals' ruling directly contrary to *Calcano-Martinez* and *St. Cyr*, the granting of certiorari in Mr. Ebeck's case is necessary to secure and maintain uniformity with this Court's decisions and to conform with controlling precedent of this Court.

Mr. Ebeck continues to maintain that § 2241 is properly relied upon because the remedies provided by 28 U.S.C. § 2255 are "inadequate or ineffective to test the legality" of his detention due to the numerous procedural barriers. The lengthy procedural history of Mr. Ebeck's case, reflecting that no court has ever addressed the merits of Mr. Ebeck's claims, establishes that he has properly invoked the remedies of § 2241. Section 2255 is "inadequate or ineffective" to challenge Mr. Ebeck's detention because it bars the filing of most successive writs.[2] In the case at bar, § 2241 has been properly invoked because Mr. Ebeck has a factual innocence claim – *of which the United States conceded* – which, by its very nature, can never be defaulted.

The district court and the Eighth Circuit erred in denying Mr. Ebeck's claims without affording him an evidentiary hearing or consideration on the merits. As the facts establish, Mr. Ebeck can show that he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction and sentence

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[2] *See, e.g., Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998); *Kelly v. United States*, 29 F.3d 1107, 1113 (7th Cir. 1994); *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002) (holding that § 2255 is "inadequate or ineffective" only when a structural problem of § 2255 forecloses even one round of effective collateral review – and then . . . only when the claim of being foreclosed is one of actual innocence).

because the evidence necessary to prove his claim was not found until after his first § 2255 petition was filed.

The jurisdictional defect supporting Mr. Ebeck's claim of actual innocence was discovered by Dobbs who unearthed evidence that the State of Missouri declined to cede jurisdiction over any part of the White River Watershed to the United States Army in connection with the Army Corps of Engineers site situated there and reserved such jurisdiction for itself. *See* R.S. Mo. § 12.025. Moreover, there is no evidence that the United States ever accepted jurisdiction by filing the requisite notice of acceptance with the Missouri Governor as directed by 40 U.S.C. § 255. Absent such acceptance, there is a conclusive presumption against federal government jurisdiction in the acquired lands. *See* 40 U.S.C. § 255.

The federal government did not concede its lack of territorial jurisdiction in this case until more than seven years after Mr. Ebeck pled guilty to violations of 18 U.S.C. §§ 1201(a)(2) and 924(c). Because the federal government has conceded that it lacked territorial jurisdiction and that an element of the offense is thus wholly lacking, Mr. Ebeck cannot be guilty of any *federal* offense because a statutory element of the crime includes its commission on federal property which is within the exclusive or concurrent jurisdiction of the United States. 18 U.S.C. § 1201. This is precisely the type of case for which the Court's equitable powers under the "miscarriage of justice" rule should be invoked to permit Mr. Ebeck to prove his actual innocence of a *federal* crime.

> The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless . . . Under our system of criminal justice even a thief is entitled

> to complain that he has been unconstitutionally convicted and imprisoned as a burglar.

Jackson v. Virginia, 433 U.S. 307, 323-324, 99 S.Ct. 2781, 2791 (1979) (citations omitted).

This Court has continually affirmed this principle and has held that a petitioner who can demonstrate his actual innocence can overcome procedural defaults because the unjust and wrongful detention of an inmate who is actually innocent constitutes a fundamental miscarriage of justice. *See Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604 (1998); *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995). To establish actual innocence, the petitioner must demonstrate that, "in light of all the evidence," it is "more likely than not that no reasonable juror would have convicted him." *Schlup*, 115 S.Ct. at 867-68.

Applying the standard discussed in *Schlup* and *Bousley*, it is clear that Mr. Ebeck is factually innocent of federal kidnaping. No reasonable juror could have convicted him when evidence of an essential element of the offense – jurisdiction – was wholly lacking. This cannot be considered a claim of mere "legal insufficiency." The Eighth Circuit did not foreclose in *Lurie* the claim that a compelling showing of actual innocence may be sufficient to permit a petitioner to rely on section 2241. *Id.* at 1077. *See also Embrey v. Hershberger*, 131 F.3d 739, 471 (8th Cir. 1997).

Factual innocence in this case is clear. The district court that sentenced Mr. Ebeck was without the jurisdiction to do so. "The validity of an order of a federal court depends upon the court's having jurisdiction both over the subject matter and the parties." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S.Ct.

2099 (1982) (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171-172 (1938)). Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. *Id.* at 2104. A federal court has not only the option, but the obligation at any time to inquire into jurisdiction whenever the possibility of its absence exists. *Fitzgerald v. Seaboard System Railroad, Inc.*, 760 F.2d 1249, 1251 (11th Cir. 1985). Without the incident occurring on federal land, it is factually impossible for Mr. Ebeck to have committed the federal crime of kidnaping under 18 U.S.C. § 1201(a)(2).

Federal courts have held that a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 can serve as an alternative route for the petitioner to seek relief from an unjust confinement which violates his constitutional rights.[3] This is a long held standard by the Supreme Court

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[3] *See, e.g., Jeffers v. Chandler*, 234 F.3d 277 (5th Cir. 2000); *Lorentsen v. Hood*, 223 F.3d 950, 954 (9th Cir. 2000) (citing *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999)) (holding that a federal prisoner who is "actually innocent" of the crime of conviction, but who never had an unobstructed procedural opportunity at presenting a claim of innocence, may resort to § 2241 if § 2255 is foreclosed); *In re Davenport*, 147 F.3d 605 (7th Cir. 1998); *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997) (holding that the "inadequate and ineffective" language in § 2255 must refer to those cases where the inability of the petitioner to pursue collateral review would raise serious constitutional questions and that such a person "must have recourse to the judicial system."); *In re Dorsainvil*, 119 F.3d 245, 248-51 (3d Cir. 1997); *Kinder v. Purdy*, 222 F.3d 209 (5th Cir. 2000) (holding that the scope of § 2255 is no different than the scope of the § 2241 remedy and that the "purpose [of permitting alternative remedy under § 2241] was to minimize the difficulties encountered in habeas corpus hearings affording the same rights in another and more convenient forum"; *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002).

in *United States v. Hayman*, 342 U.S. 205, 214 (1952). This claim of innocence alone opens the avenues of review under § 2241 based on the equitable doctrine of fundamental fairness.

For the foregoing reasons, Mr. Ebeck continues to assert that the district court and the Eighth Circuit Court of Appeals failed to properly interpret the meaning of "factual innocence" and failed to grasp that this term refers to those who cannot be guilty of a federal crime because evidence of an essential element is wholly lacking. *See, e.g., Martin v. Perez*, 319 F.3d 799, 801 (6th Cir. 2003).

Additionally, the district court and the Eighth Circuit erred in finding that Mr. Ebeck's petition should be treated as a successive § 2255 petition, rather than a petition pursuant to § 2241. Some circuits have determined that a remedy available under § 2255 may be considered inadequate or ineffective to test the legality of a person's detention if it can be shown that "some limitation of scope or procedure would prevent a Section 2255 proceeding from affording the prisoner a full hearing and adjudication of his claim of wrongful detention." *United States v. Brooks*, 230 F.3d 643 (3d Cir. 2000). *See also Jeffers v. Chandler*, 234 F.3d 277 (5th Cir. 2000); *In re Dorsainvil*, 119 F.3d 2435 (3d Cir. 1997) (noting that allowing the unique and unusual petitioner, who had no earlier opportunity to challenge his conviction, the opportunity to proceed under § 2241 when avenues of § 2255 are foreclosed will not undermine the gatekeeping provisions of § 2255).

In this respect, the district court and the Eighth Circuit Court of Appeals erred in finding that Mr. Ebeck's petition should be treated as a successive § 2255. He has a viable argument because it can be shown that he has had

no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction and sentence because the evidence necessary to prove his claim was not found until after his first § 2255 was filed. This is precisely an example of the case for which the court's equitable powers under the miscarriage of justice rule should be invoked to permit Mr. Ebeck to prove his factual innocence of the federal crime. As Justice Stevens points out in his concurrence to the opinion in *Murray v. Carrier*, 106 S.Ct. 2639 (1986), "the character of respondent's constitutional claim should be central to an evaluation of his habeas corpus petition." 106 S.Ct. at 2651. "The significance of such a claim can easily be lost in a procedural maze of enormous complexity." *Id.* at 2650.

To date, no court has addressed the merits of Mr. Ebeck's claims. His factual innocence claim is meritorious and ripe for review. Yet, both the district court and the Eighth Circuit Court of Appeals failed to address the substance of the claims, dismissing them on procedural grounds. Because no court deemed it appropriate to reach this claim under § 2255, that statute has obviously been "inadequate or ineffective" to test the legality of Mr. Ebeck's detention and the procedural haste to deny Petitioner's various pleas has resulted in the illegal detention of one who is actually factually innocent of a federal crime. *See* 28 U.S.C. § 2255. Mr. Ebeck was convicted of a federal offense without proving all elements and, therefore, he is serving an illegal sentence.

In addition to misinterpreting the meaning of factual innocence, the district court and the Eighth Circuit Court of Appeals also failed to address the significance of this Court's decisions in *Calcano-Martinez v. Immigration and Naturalization Service*, 121 S.Ct. 2268 (2001) and *Immigration and Naturalization Service v. St. Cyr*, 121 S.Ct. 2271

(2001). In those decisions, this Court affirmed that § 2241 remains as a remedy to challenge illegal detention when no other remedy is available. Although the Antiterrorism and Effective Death Penalty Act has restricted availability of habeas relief, it cannot constitutionally strip courts of the ability to address claims under § 2241 when an inmate is being confined on a *federal* offense despite a complete and conceded lack of *federal* jurisdiction by the United States Government.

The Supreme Court addressed the purpose and importance of § 2241 in these two decisions. Both of these decisions arose in the context of immigration cases under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). At issue in *Calcano-Martinez* was a new statute which expressly precluded the courts of appeals from exercising "jurisdiction to review any final order of removal by reason of" a conviction for certain criminal offenses. This Court held that "leaving aliens without a forum for adjudicating claims such as those raised . . . would raise serious constitutional questions." This Court therefore construed the "jurisdiction-stripping provisions" of the IIRIRA not to preclude aliens from "pursuing habeas relief pursuant to section 2241."

This Court's decision in *St. Cyr* similarly addresses § 2241. At issue in *St. Cyr* were amendments under the AEDPA and the IIRIRA which, according to the Attorney General, removed his discretion to consider a waiver of deportation of an alien. This Court held that the Suspension Clause of the Constitution, which limits the suspension of the writ of habeas corpus, required that § 2241 relief remain available to address a question of law, such as the one raised by St. Cyr. This Court stated:

> [A] serious Suspension Clause issue would be presented if we were to accept the INS's submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise.

Id. at 2280. The Court added that the "absence of another forum," coupled with the lack of a clear statement by Congress precluding judicial consideration of habeas of "such an important question of law," weighed strongly against the adoption of a "construction that would raise serious constitutional questions." *Id.* at 2286. This Court further held that habeas jurisdiction under § 2241 "was not repealed by AEDPA and IIRIRA."

The applicability of *Calcano-Martinez* and *St. Cyr* to the case at bar is clear. Congress did not clearly and expressly state its desire to preclude judicial consideration in habeas of important questions when § 2255 is found to be inadequate or ineffective to test the legality of an inmate's detention. In fact, § 2255 recognizes situations where a writ of habeas corpus may still be available because § 2255 is "inadequate or ineffective" to address the issues raised. Thus, § 2241 must remain available as an avenue of relief when *there is no question that federal jurisdiction was completely absent* proving the factual innocence of Mr. Ebeck.

If denied the remedy provided under § 2241, Mr. Ebeck will continue to suffer a substantial miscarriage of justice in that he is factually innocent of the crime of kidnaping on land within the federal jurisdiction of the United States under 18 U.S.C. § 1201(a)(2).

This Court should grant certiorari because the district court and the Eighth Circuit Court of Appeals erroneously

found that Mr. Ebeck's petition for writ of habeas corpus was a "successive § 2255 petition." Rather, Mr. Ebeck has shown that his Petition for Writ of Habeas Corpus pursuant to § 2241 is the appropriate vehicle because he has exhausted all remedies under 28 U.S.C. § 2255 and that § 2255 was "inadequate and ineffective" to test the legality of his detention. He has also clearly shown that he has a meritorious claim of factual innocence of a federal crime.

CONCLUSION

Mr. Ebeck respectfully requests that this Court grant his Petition for Writ of Certiorari. The decisions of the district court and the Eighth Circuit Court of Appeals are contrary to existing precedent and are contrary to the holdings of this Court in *Calcano-Martinez v. Immigration and Naturalization Service*, 121 S.Ct. 2268 (2001) and *Immigration and Naturalization Service v. St. Cyr*, 121 S.Ct. 2271 (2001). Mr. Ebeck further requests that this Court reverse the decision of the Eighth Circuit and remand with directions to permit him to proceed with his factual innocence claim through a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2166	*	Appeal from the United
Gary Ebeck,	*	States District Court for
	*	the Western District of
Appellant,	*	Missouri.
	*	
v.	*	
	*	
Bill Hedrick, Warden,	*	
United States Medical	*	
Center for Federal	*	
Prisoners,	*	
	*	
Appellee.	*	

Before McMILLIAN, RILEY, and MELLOY, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

(5361-010199)

September 5, 2002

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

GARY EBECK, Petitioner,	)	Civil Action No. 01-3149-CV-S-4-H-ECF
v.	)	
BILL HEDRICK, Warden, et al.,	)	
Respondents.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Petitioner, an inmate confined in the United States Medical Center for Federal Prisoners, petitions this Court for a writ of habeas corpus in which he challenges his conviction. The petition has been referred to the undersigned for preliminary review under 28 U.S.C. § 636(b). Petitioner has prepaid the filing fee, and does not request leave to proceed in forma pauperis. Because petitioner has failed to establish a legal basis for by-passing the traditional § 2255 remedy, it will be recommended that the petition for writ of habeas corpus be dismissed without prejudice.

Petitioner seeks relief pursuant to 28 U.S.C. § 2241, contending that 28 U.S.C. § 2255 is inadequate or ineffective to test the legality of his detention. His argument that the remedy is inadequate or ineffective hinges on his claim that because of the bar on filing successive petitions, he is unable to litigate a substantial claim that the district court lacked subject matter jurisdiction, a claim that has never been addressed on

the merits, and which, he contends, can never be defaulted. Petitioner asserts that, if denied the remedy provided under § 2241, he will suffer a substantial miscarriage of justice because he can prove on the record and the facts that he is actually innocent of the crime of kidnaping on federal land under 18 U.S.C. § 1201(a).

Additionally, petitioner contends that because the government has conceded the lack of subject matter jurisdiction in this case, the Court need only determine if § 2241 is the proper remedy for him to seek relief. He asserts that, because of the government's concession, he is not guilty of the two offenses to which he pled, and therefore, that he is factually innocent. It is petitioner's contention that § 2241 is available as an avenue of relief when there is no question that federal jurisdiction is completely absent, analogizing to cases where the Supreme Court has found that habeas relief may be available when other forums are not available. He asserts that he has established that § 2255 is inadequate or ineffective to address his claim of actual innocence.

It is the government's position that this petition is nothing more than a successive § 2255 petition, that petitioner is not actually innocent, and that the lack of subject matter jurisdiction is not a proper argument to be raised in a successive habeas petition filed under the Antiterrorism and Effective Death Penalty Act ["AEDPA"].

The record indicates that petitioner pled guilty to a violation of the federal kidnaping statute, 18 U.S.C. § 1201, and to aiding and abetting the use of a firearm during the commission of the kidnaping in violation of 18 U.S.C. § 924(c). The indictment alleged that the kidnaping occurred within "the special maritime and territorial

jurisdiction of the United States." 18 U.S.C. § 1201(a)(2). The government asserts that it is clearly established in the record that petitioner and his accomplices kidnaped the victim for the purpose of extorting drugs and drug money. It is also asserted that it is not disputed that the kidnaping occurred on land owned by the United States. The government concedes, however, that the site of the crime was not under the "territorial jurisdiction of the United States," within the meaning of 18 U.S.C. § 1201(a)(2) and 18 U.S.C. § 7(3).

Petitioner has filed numerous petitions and motions in pursuit of habeas relief on the issue of federal versus state jurisdiction of the situs of his crime. He contends that approximately three years after his conviction and after habeas proceedings had already taken place, he discovered that he was actually innocent of the federal crime of kidnaping because a statutory element of the crime includes commission on federal property, which did not exist in his case. Petitioner asserts that when he discovered this error, he filed a second § 2255 motion alleging lack of subject matter jurisdiction. That motion was denied by the district court in July of 1997 because he did not file a certificate of appealability. His motion for reconsideration was later denied. He then filed an application for a certificate of appealability, which the district court denied. Petitioner appealed that decision to the Eighth Circuit Court of Appeals, which appeal was denied both by a three-judge panel and then by the Court en banc. In March of 1998, petitioner then filed a habeas petition pursuant to § 2241 in the United States District Court for the Central District of Illinois. The Court construed the motion as a successive petition under § 2255 and transferred it to the sentencing court, which also

denied it. Petitioner then filed a motion under Fed. R. Civ. P. 60(b) alleging that he had not authorized or signed his first § 2255 motion, and that the Court lacked jurisdiction to convict or sentence him. The Court treated the motion as a § 2255 motion and denied it, which decision was eventually affirmed by the Eighth Circuit. Petitioner then filed an application for leave to file a successive § 2255 motion in August, 2000, on the jurisdictional issue, which was summarily denied by the Court.

Having carefully reviewed the various arguments of the parties, the Court must agree with the government that petitioner's claim should be construed as a successive petition under § 2255. According to § 2255, the lack of subject matter jurisdiction is not a proper argument to be raised in a successive habeas petition filed under the AEDPA. Rather, the petition must contain either "newly discovered evidence" that would establish by clear and convincing evidence that no jury would find the petitioner guilty, or a new rule of constitutional law, made retroactive by the Supreme Court, which was previously unavailable. A jurisdictional issue does not come within the parameters of a certifiable successive petition under § 2255. In this case, it cannot be said that petitioner has established that his jurisdictional claim has been properly brought as a successive § 2255. Because petitioner is procedurally barred from proceeding pursuant to § 2255, he has the burden of showing that the "inadequate or ineffective" test has been met, and that he should be allowed to proceed under § 2241. *Von Ludwitz v. Ralston*, 716 F.2d 528, 529 (8th Cir. 1983) (per curiam).

Petitioner has asserted that the § 2255 remedy is inadequate in this case because he is advancing a claim

of actual innocence. The only case from the Eighth Circuit that touches on the question of whether a claim of actual innocence can permit the otherwise procedurally barred petitioner to proceed pursuant to § 2241 is *United States v. Lurie*, 207 F.3d 1075 (8th Cir. 2000). In *Lurie*, the Eighth Circuit declined to address whether a claim of actual innocence was adequate to bypass the gatekeeping requirements of § 2255 and proceed under § 2241. "While courts have not thoroughly defined what is meant by 'inadequate or ineffective,' recent cases from our sister circuits make clear that more is required than demonstrating that there is a procedural barrier to bringing a § 2255 motion." 207 F.3d at 1077 [citations omitted]. The Court held that all of petitioner's claims, including a claim of actual innocence, could have been brought in a timely fashion, and that he failed to meet his burden of proving that the § 2255 motion was inadequate or ineffective. In regard to the petitioner's actual innocence claim, the Court emphasized that he had presented nothing more than an unsupported allegation of actual innocence, and therefore declined to address whether a claim of actual innocence would allow a petitioner "to bypass the gatekeeping requirements of the amended § 2255 and proceed with a § 2241 habeas corpus petition via § 2255's savings clause." *Id.* at 1077 n.5. The Court emphasized that actual innocence claims are extremely rare, and are based on "factual innocence not mere legal insufficiency." *Id.* at 1077 n.4 [citation omitted]. The Eighth Circuit has also reiterated that in noncapital cases "the concept of actual innocence is 'easy to grasp,' because 'it simply means the person didn't commit the crime.'" *Embrey v. Hershberger*, 131 F.3d 739, 741 (8th Cir. 1997) (citations omitted).

In this case, the record indicates that petitioner admitted when he entered his plea that he was guilty of kidnaping. He also pled guilty to aiding and abetting the use of a firearm during the commission of the kidnaping in violation of 18 U.S.C. § 924(c). Without addressing the issue of whether petitioner must show that he was actually innocent of all the charges encompassed in the plea bargain agreement under the rubric of *Bousely v. United States,* 523 U.S. 614 (1998), as the government contends, this Court is of the opinion that he has only asserted a legal argument in this case. His argument does not state a claim of factual innocence of the charges to which he pled, and he has presented no proof that he is actually innocent of the crime. Rather, he has asserted an unsubstantiated claim of actual innocence based on mere legal insufficiency. Based on applicable and available case law in this circuit, this Court concludes that petitioner's assertions fall short of the necessary factual allegations that would provide him access to § 2241.

Having carefully reviewed the record, the Court finds that petitioner has failed to establish that the § 2255 is inadequate or ineffective, and has therefore failed to invoke the savings clause that would allow him to proceed with a habeas corpus petition under § 2241. Given that conclusion, his claim is nothing more than a successive petition under § 2255, and must be dismissed.

Whatever the merits of petitioner's complaint, the action is improperly filed under the provisions of 28 U.S.C. § 2241. Because petitioner has failed to establish a legal basis for bypassing the traditional § 2255 remedy, it must be recommended that the petition herein for writ of habeas corpus be dismissed without prejudice.

For the foregoing reasons, it is, pursuant to the governing law and in accordance with Local Rule 22 of the United States District Court for the Western District of Missouri,

RECOMMENDED that the petition herein for writ of habeas corpus be dismissed without prejudice.

/s/ James C. England
JAMES C. ENGLAND
United States Magistrate

Date: 12/5/01

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

GARY EBECK,	)	
Petitioner,	)	
	)	**Civil Action**
v.	)	**No. 01-3149-CV-S-**
BILL HEDRICK, WARDEN, et al.,	)	**4-H-ECF**
	)	
Respondents.	)	

ORDER AND JUDGMENT

Pursuant to the governing law and in accordance with Local Rule 22 of the United States District Court for the Western District of Missouri, the petition herein for a writ of habeas corpus was referred to the United States Magistrate for preliminary review under the provisions of 28 U.S.C. § 636(b).

The United States Magistrate has completed his preliminary review of the petition herein for a writ of habeas corpus and has submitted to the undersigned a report and recommendation that the petition be dismissed without prejudice.

Petitioner has filed written exceptions to the report and recommendation of the Magistrate in which he continues to assert that he is being illegally confined. Petitioner also asserts that the Magistrate misconstrued the nature of his claim; he alleges that "[t]he critical distinction here is that it is not the ownership or occupation of the land that matters, it is the assertion of *criminal jurisdiction*." [Petitioner's Exceptions, at 2]. He contends that because the United States has conceded that federal

jurisdiction over the site of the crime is totally lacking, the only remaining issue is whether 28 U.S.C. § 2241 is a proper vehicle for raising his claims. He continues to assert that the remedies provided by § 2255 are inadequate or ineffective to test the legality of his detention.

The United States has filed Reply Suggestions in Support of the Magistrate's Report and Recommendation, in which it is asserted that the Magistrate recognized that petitioner's claim is that there was not federal jurisdiction to prosecute the crime to which he pled guilty. The government also contends that the true issue, which the Magistrate addressed, is petitioner's attempt to use § 2241 to escape the strictures of the Antiterrorism and Effective Death Penalty act ["AEDPA"], which restricts successive habeas petitions.

After a full de novo review of the report and recommendation and the files and records in this case, it is concluded that the findings of fact, conclusions of law, and proposed actions of the Magistrate are correct and should be approved. As the Magistrate correctly held, a jurisdictional issue does not come within the parameters of a certifiable successive petition under § 2255. Therefore, petitioner is procedurally barred from proceeding under that statutory provision, and must show that the remedy is inadequate or ineffective in order to proceed under § 2241. While petitioner relies on a claim of actual innocence, the Magistrate found that that claim was nothing more than an unsupported allegation of legal insufficiency, and that he did not state a claim of factual innocence of the charges to which he pled. This Court agrees with the Magistrate's reliance on *United States v. Lurie*, 207 F.3d 1075 (8th Cir. 2000), and *Embrey v. Hershberger*, 131 F.3d 739 (8th Cir. 1997), in support of the finding that

petitioner has not stated a claim of factual innocence. Additionally, although petitioner continues to rely on the Supreme Court's decisions in *Calcano-Martinez v. INS,* 121 S.Ct. 2268 (2001), and *INS v. St. Cyr,* 121 S.Ct. 2271 (2001), it is clear that those cases are inapposite to the case before the Court. Accordingly, the Court finds that petitioner's claim is nothing more than a successive petition under § 2255, which must be dismissed.

Therefore, it is

ORDERED that petitioner's exceptions filed herein be, and they are hereby, CONSIDERED and OVERRULED. It is further

ADJUDGED that the petition herein for a writ of habeas corpus be, and it is hereby, dismissed without prejudice.[1]

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States
District Court

DATED: April 8, 2002

[1] Petitioner has prepaid the filing fee, and does not request leave to proceed in forma pauperis.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

GARY EBECK, Petitioner, v. BILL HEDRICK, Warden, United States Medical Center for Federal Prisoners, Respondent.	)	Civil Action No. 01-3149-CV-S-4-H

ORDER

Petitioner has filed an Application for Certificate of Appealability, after denial of his Habeas Corpus Petition. In the application, he again asserts the position that he is actually innocent of the crime of conviction, and that this Court failed to address the significance of two recent Supreme Court decisions. Because the petitioner has failed to present a claim of actual innocence as has failed to establish that the provisions of 28 U.S.C. § 2255 are inadequate or ineffective, it must be concluded that defendant has failed to make a substantial showing of the denial of a constitutional right. It is therefore

ORDERED that the Application for Certificate of Appealability be denied.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States
District Court

DATED: June 3, 2002

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2166

Gary Ebeck,	*	
Appellant,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	*	
Bill Hedrick, etc.,	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

December 10, 2002

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
AUG 11 2003
OFFICE OF THE CLERK

No. 02-1643

In the Supreme Court of the United States

GARY EBECK, PETITIONER

v.

BILL HEDRICK, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the remedy provided by 28 U.S.C. 2255 is "inadequate or ineffective," so that a federal prisoner may file a petition for a writ of habeas corpus under 28 U.S.C. 2241, when the prisoner's claim of "actual innocence" is based on a claim—that his offense was not committed in the territorial jurisdiction of the United States—that was available but not made when he filed his first Section 2255 motion.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2002. A petition for rehearing was denied on December 10, 2002 (Pet. App. 13A). On February 27, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 9, 2003, and the petition was filed on May 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Western District of Missouri, petitioner was convicted of kidnapping within the territorial jurisdiction of the United States (18 U.S.C. 1201(a)) and using and carrying a firearm during and in relation to a crime of violence (18 U.S.C. 924(c)(1)(A)). The district court imposed a sentence of 300 months' imprisonment, which was later reduced to 240 months. The court of appeals affirmed.

Petitioner filed two motions under 28 U.S.C. 2255, which were denied, and a petition for a writ of habeas corpus under 28 U.S.C. 2241, which was treated as a motion under Section 2255 and denied. Petitioner subsequently filed a motion under Federal Rule of Civil Procedure 60(b), which the district court treated as a Section 2255 motion and denied. The court of appeals affirmed.

Petitioner then filed a petition for a writ of habeas corpus under Section 2241. The district court treated the motion as a Section 2255 motion, dismissed it, and denied petitioner's application for a certificate of appealability. The court of appeals also denied petitioner's application for a certificate of appealability, and dismissed his appeal.

1. Petitioner was the leader of an organization that committed burglaries and robberies in Missouri and other States in the late 1980s and early 1990s. PSR ¶¶ 17, 83-104. The members of the group used methamphetamine, which their supplier obtained from Mitchell Courtney. PSR ¶¶ 18-19. On July 20, 1993, petitioner and three other members of his organization —Donald Rogers, Jeffrey Foster, and Jary Swope— agreed to steal drugs and money from Courtney and to

force him to reveal the identity and location of his supplier. PSR ¶ 20. Petitioner, Rogers, and Foster then entered Courtney's house and waited for him to return. *Ibid.* When Courtney came home shortly after midnight, petitioner and the others interrogated him at gunpoint until he revealed that his methamphetamine supplier was Larry Johnson and told them where Johnson could be found. PSR ¶¶ 21-22. After stealing methamphetamine and cash from Courtney, the men agreed that Swope would keep him locked in the trunk of his car in a wooded area of petitioner's property while petitioner and the others went to find Johnson. *Ibid.*

Armed with two semiautomatic pistols and a shotgun they had stolen from Courtney, petitioner, Rogers, and Foster drove in Swope's van to the United States Army Corps of Engineers campground near Kimberling City, Missouri. PSR ¶ 24. The men found Johnson outside his camper and forced him into the van at gunpoint. PSR ¶ 25. When a campground worker approached the van, petitioner drove several blocks and ordered Johnson to get out of the van with Rogers and Foster. *Ibid.* Petitioner was arrested later that day when he returned to the campground to try to retrieve money and drugs from Johnson's camper. PSR ¶ 28.

2. On August 5, 1993, petitioner was charged in an indictment in the Western District of Missouri with Rogers, Foster, and Swope. Count 1 (8/5/93 Indict. 1-2) charged petitioner with kidnapping Johnson "on lands acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, and within the territorial jurisdiction of the United States," in violation of 18 U.S.C. 1201(a)(2). That provision prohibits kidnapping "within the special maritime and territorial jurisdiction of the United States."

Count 3 (8/5/93 Indict. 2-6) charged petitioner with conspiracy to commit kidnapping within the territorial jurisdiction of the United States, in violation of 18 U.S.C. 1201(c). Counts 2 and 4 (8/5/93 Indict. 2, 6) charged him with using and carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). On October 8, 1993, petitioner was charged in a separate indictment with one count of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. 846, and one count of criminal forfeiture under 21 U.S.C. 853. 10/8/93 Sup. Indict. 1-3.

On January 5, 1994, petitioner pleaded guilty to Counts 1 and 2 of the August indictment. In exchange for his plea, the government agreed to dismiss Counts 3 and 4 of that indictment and both counts of the October indictment. 1/5/94 Tr. 2-3. In his plea agreement, petitioner admitted that he had participated in the kidnapping of Johnson in order to steal drugs and drug proceeds. Plea Bargain Agreement 1-3. At the change-of-plea hearing, petitioner acknowledged that he had "assist[ed] in kidnapping Larry Johnson" and that the kidnapping occurred "on property under the control of the Corps of Engineers." 1/5/94 Tr. 13-14. The district court accepted petitioner's plea. *Id.* at 15.

On March 29, 1994, petitioner was sentenced to 240 months' imprisonment on Count 1 and a consecutive 60-month prison term on Count 2. 98-3459 Gov't C.A. Br. 1. The court of appeals rejected petitioner's claim that the district court had clearly erred in finding that he was an organizer or leader of criminal activity, see Sentencing Guidelines § 3B1.1(c), and affirmed his sentence. *United States* v. *Ebeck*, No. 94-1905, 1994 WL 419792 (8th Cir. Aug. 12, 1994) (unpublished opinion). On November 28, 1995, on the basis of his cooperation

with law enforcement authorities, petitioner's sentence on Count 1 was reduced to 180 months' imprisonment under Federal Rule of Criminal Procedure 35(b). 98-3459 Gov't C.A. Br. 1-2.

3. On June 12, 1996, petitioner filed a motion under 28 U.S.C. 2255. In the motion, he claimed that his conviction violated the Double Jeopardy Clause, because he had previously been subjected to civil forfeiture proceedings; that his sentence was improperly calculated, because the district court had failed to determine the type of methamphetamine involved; that his Section 924(c) conviction violated *Bailey* v. *United States*, 516 U.S. 137 (1995), because he had not personally used or carried a firearm; and that he received ineffective assistance of counsel, because his attorney had an actual conflict of interest. 98-3459 C.A. App. 88-130. The district court rejected each of these claims and denied the motion. *Id.* at 189-192. The court of appeals denied petitioner's application for a certificate of appealability. 98- 3459 Gov't C.A. Br. 2.

On April 4, 1997, petitioner filed a second Section 2255 motion, in which he claimed that the district court lacked subject matter jurisdiction over the prosecution of the kidnapping offense, because the campground where the offense occurred was not within the territorial jurisdiction of the United States. 98-3459 C.A. App. 220-291. The district court (*id.* at 423-424) denied the motion, because petitioner had not obtained authorization from the court of appeals to file a successive motion for collateral relief. See 28 U.S.C. 2244(b)(3), 2255 para. 8. The district court also denied petitioner's application for a certificate of appealability, as did the court of appeals. 98-3459 Gov't C.A. Br. 3.

On March 9, 1998, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Central

District of Illinois, where he was then incarcerated. In the petition, he claimed that he was actually innocent of the charges to which he pleaded guilty. The district court treated the petition as a motion under Section 2255 and transferred it to the United States District Court for the Western District of Missouri, which denied relief. 98-3459 Gov't C.A. Br. 4.

On May 29, 1998, petitioner filed a motion under Federal Rule of Civil Procedure 60(b) in which he requested that the order denying his second Section 2255 motion be vacated. 98-3459 C.A. App. 458-499. In his motion, petitioner again claimed that the district court lacked subject matter jurisdiction over the kidnapping charge. *Ibid.* The district court treated petitioner's Rule 60(b) motion as a successive motion under 28 U.S.C. 2255 and denied it, because petitioner had not received the requisite authorization from the court of appeals. 98-3459 C.A. App. 515-517. The court of appeals affirmed, agreeing with the district court that "[a] Rule 60(b) motion seeking relief from the denial of a § 2255 motion and raising claims of a postconviction relief nature * * * should be construed as a successive § 2255 motion." *Ebeck* v. *United States*, No. 98-3459, 1999 WL 1144828, at *1 (8th Cir. Nov. 23, 1999) (unpublished opinion).

4. On April 2, 2001, petitioner filed a petition for a writ of habeas corpus under Section 2241 in the Western District of Missouri, where he was then incarcerated. He claimed that he was actually innocent of the kidnapping charge, because the property on which the crime occurred was not within the jurisdiction of the United States. Pet. for Writ of Habeas Corpus 1-2. Petitioner also claimed that he was entitled to relief under Section 2241, because the restrictions on successive motions precluded him from raising his jurisdic-

tional claim in a Section 2255 motion, which consequently provided an inadequate or ineffective remedy. *Id.* at 1. In its response, the government conceded that, although the "kidnapping occurred on land owned by the United States, * * * the site of the crime was not under the 'territorial jurisdiction of the United States' within the meaning of 18 U.S.C. § 1201(a)(2)." Resp. to Pet. Rep. Suggestions in Support of His Pet. 1. The basis for the concession was that, while "ownership of the land conferred proprietary jurisdiction, the statutorily prescribed steps to obtain 'legislative' jurisdiction were not taken." *Ibid.* (citing 40 U.S.C. 255). Relying on this Court's decision in *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998), however, the government argued that petitioner was not entitled to relief based on his claim of actual innocence, because he could not show that he was actually innocent of the charges that were dismissed in exchange for his guilty plea. Resp. to Pet. Rep. Suggestions in Support of His Pet. 3-6.

The magistrate judge to whom the petition was referred recommended that it be dismissed. Pet. App. 2A-8A. Noting that petitioner had "admitted when he entered his guilty plea that he was guilty of kidnapping," the magistrate judge found that petitioner had failed to "state a claim of factual innocence of the charges to which he pled," and that petitioner's actual innocence claim was "based on mere legal insufficiency." *Id.* at 7A. Because petitioner could not show that he was entitled to proceed under Section 2241, the magistrate judge concluded, his "claim should be construed as a successive petition under § 2255" and dismissed. *Id.* at 5A.

The district court adopted the magistrate judge's report and recommendation, and dismissed the petition. Pet. App. 9A-11A. The court agreed that petitioner

had not "stated a claim of factual innocence" and that his petition was "nothing more than a successive petition under § 2255, which must be dismissed." *Id.* at 11A. The district court denied petitioner's application for a certificate of appealability, finding that he had "failed to make a substantial showing of the denial of a constitutional right." *Id.* at 12A.

In a one-paragraph summary order, the court of appeals denied petitioner's application for a certificate of appealability and dismissed his appeal. Pet. App. 1A.

ARGUMENT

Petitioner contends (Pet. 15-27) that he is "factually innocent" of the kidnapping offense, because the crime was not committed within the territorial jurisdiction of the United States, as required by 18 U.S.C. 1201(a). He contends (Pet. 15-27) that a motion under 28 U.S.C. 2255 provides an "inadequate or ineffective" remedy, because he is prohibited from raising his jurisdictional claim in a successive Section 2255 motion, and that he should therefore have been permitted to seek relief under 28 U.S.C. 2241. The district court correctly treated petitioner's petition as a successive motion under Section 2255; the court of appeals correctly denied petitioner's application for a certificate of appealability; and the court of appeals' unpublished summary order does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Under Section 2241, federal courts may issue writs of habeas corpus to federal or state prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). See *Felker* v. *Turpin*, 518 U.S. 651, 659-660 & nn.1-2 (1996); *United States* v. *Hayman*, 342 U.S. 205, 211-212

& n.11 (1952). A habeas corpus petition must be filed in the district with jurisdiction over the defendant's custodian, which is typically the jurisdiction where the defendant is imprisoned. See *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-495 (1973). Because a federal prisoner may be incarcerated far from the district in which he was convicted and sentenced, habeas corpus petitions filed by federal inmates can create serious administrative difficulties. See *Hayman*, 342 U.S. at 213-214 & n.18.

In 1948, Congress responded to these concerns by enacting 28 U.S.C. 2255. See *Hayman*, 342 U.S. at 219. Section 2255 allows a federal prisoner to obtain collateral review of his conviction and sentence by filing a motion (rather than a habeas corpus petition) in the district where he was convicted and sentenced. 28 U.S.C. 2255 para. 1. Section 2255 replaces the habeas corpus remedy in most cases, providing that

> [a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section[] shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. 2255 para. 5. A habeas corpus petition challenging a federal prisoner's conviction can thus be brought under Section 2241 only if the prisoner can establish that Section 2255 is "inadequate or ineffective."

As numerous courts have recognized, Section 2255 is not "inadequate or ineffective" simply because relief

has already been denied under that provision, because a prisoner is procedurally barred from pursuing such relief, or because a prisoner has been denied permission to file a second or successive Section 2255 motion. See *Charles* v. *Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam) (collecting cases). Such a rule would "nullify," *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998), and render "meaningless," *United States* v. *Barrett*, 178 F.3d 34, 50 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000), the limitations that Congress has placed on collateral review of federal convictions.

At the same time, several courts of appeals have concluded that a prisoner may file a petition under Section 2241 when the limits on successive Section 2255 motions would otherwise deny him a forum for asserting a claim of actual innocence of "using" a firearm under 18 U.S.C. 924(c)(1)(A), based on this Court's interpretation of "use" in *Bailey* v. *United States*, 516 U.S. 137, 150 (1995). See *In re Jones*, 226 F.3d 328, 332-334 (4th Cir. 2000); *Davenport*, 147 F.3d at 610-612; *Triestman* v. *United States*, 124 F.3d 361, 376-378 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248-252 (3d Cir. 1997). These courts have reasoned that a narrow exception to the exclusivity of Section 2255 is warranted for a federal prisoner whose claim of factual innocence was not available when his initial Section 2255 motion was filed, and who thus "never has had 'an unobstructed procedural shot' at presenting [the] claim of innocence." *Lorentsen* v. *Hood*, 223 F.3d 950, 954 (9th Cir. 2000) (quoting *Davenport*, 147 F.3d at 609). See, *e.g.*, *Davenport*, 147 F.3d at 611 ("A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion.");

Dorsainvil, 119 F.3d at 251 (Section 2241 petition may be filed by "a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate").

Petitioner's claim of actual innocence, however, is not based on a previously unavailable judicial decision. His claim that the site of the kidnapping was not within the territorial jurisdiction of the United States has been available to him since the indictment was returned, and could have been raised before his guilty plea, on direct appeal, or in his first Section 2255 motion. As the Eleventh Circuit has explained,

> With virtually all claims—*Bailey* is a rare exception —a petitioner will have had an "unobstructed procedural shot at getting his sentence vacated." That does not mean that he took the shot, or even that he or his attorney recognized the shot was there for the taking. All [that is] require[d] * * * is that the procedural opportunity have existed.

Wofford v. *Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999) (quoting *Davenport*, 147 F.3d at 609); accord *Ivy* v. *Pontesso*, 328 F.3d 1057, 1060 (9th Cir. 2003) ("[I]t is not enough that the petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must never have had the opportunity to raise it by motion."); *Barrett*, 178 F.3d at 53 ("[W]here a prisoner had an opportunity to present his claim properly in his first § 2255 petition, but failed to do so, any 'ineffectiveness' of his current § 2255 petition is due to him and not to § 2255.").

2. The absence of any intervening judicial decision distinguishes this case from *Martin* v. *Perez*, 319 F.3d 799 (6th Cir. 2003), a case on which petitioner relies (Pet. 16-18). In that case, the Sixth Circuit held that a

prisoner who was barred from raising in a successive Section 2255 motion an actual innocence claim under *Jones* v. *United States*, 529 U.S. 848 (2000), was entitled to seek relief under Section 2241. *Jones* was an intervening decision that held that arson of an owner-occupied residence not used for commercial purposes is not subject to federal prosecution under 18 U.S.C. 844(i), and the petitioner in *Martin* had had no opportunity to raise his *Jones* claim under Section 2255, because *Jones* was decided after he filed his first Section 2255 motion. See 319 F.3d at 805. Petitioner, in contrast, did have an earlier opportunity to raise his claim of innocence. The claim was available based on public records (Pet. 13-14, 20) and could have been raised in a first motion under Section 2255 (or even earlier). His belated discovery of his claim based on the legal status of the land on which the kidnapping occurred does not allow him to resort to Section 2241.

Petitioner's reliance (Pet. 18-19, 24-27) on *INS* v. *St. Cyr*, 533 U.S. 289 (2001), and *Calcano-Martinez* v. *INS*, 533 U.S. 348 (2001), is also misplaced. In those cases, this Court considered the effect on the availability of habeas corpus relief of 8 U.S.C. 1252(a)(2)(C), which provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [certain offenses]." The Court held that district courts retain jurisdiction under Section 2241 to review aliens' challenges to removal orders that involve pure questions of law. See *Calcano-Martinez*, 533 U.S. at 351-352; *St. Cyr*, 533 U.S. at 298-314. In so holding, the Court relied on the absence of another judicial forum to consider such challenges, "coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of

such an important question of law." *St. Cyr*, 533 U.S. at 314. In this case, by contrast, petitioner could have raised his jurisdictional claim in his first Section 2255 motion, and thus was not deprived of an opportunity to obtain judicial review. Unlike 8 U.S.C. 1252, moreover, Section 2255 specifically provides that a federal prisoner may not seek habeas corpus relief under Section 2241 unless "the remedy by [Section 2255] motion is inadequate or ineffective." 28 U.S.C. 2255 para. 5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Mr. Ebeck's claim differs from the vast majority of post-conviction claims because of one central fact: As the government now admits, the sentencing court lacked subject matter jurisdiction. Simultaneously, it is this same fact that makes Mr. Ebeck factually innocent of federal kidnaping as defined by 18 U.S.C. § 1201(a)(2).

It is well established that the parties cannot waive a jurisdictional defect of a sentencing court. Because federal courts, particularly lower federal courts, are courts of limited jurisdiction, they must be assured that their actions fall within the limited scope of powers granted under Article III of the United States Constitution. *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998). The parties are incapable of conferring jurisdiction upon the court by waiver or procedural default. *Id.* Jurisdictional claims may not be waived or defaulted since they form the basis of the court's power to act, and, therefore, a petitioner need not show "cause" to justify his failure to raise such a claim. *Id.* Even where a petitioner fails to object to the court's lack of jurisdiction at trial *or on appeal*, there is no requirement to show cause and prejudice at the time when the jurisdictional error becomes evident. *Id.* (emphasis added).

In *Harris*, the prosecutor failed to follow the proper steps necessary to confer jurisdiction upon the court to enhance the defendant's sentence due to the existence of prior convictions. *Id.* at 1306. Consequently, the court's decision to proceed with the defendant's guilty plea and to enhance the sentence without the necessary pleadings rendered the court's sentence a nullity. On appeal, the

Eleventh Circuit held that strict compliance with jurisdictional requirements was mandatory and that any sentence imposed by the court was improper. *Id.* at 1309. The court emphasized that jurisdictional elements were not subject to waiver *or procedural default* and that the court had no power to render the decision that it did. *Id.* (emphasis added). The fact that the defendant failed to raise the jurisdictional issue at trial or in his direct appeal did not bar review by the court because a court's lack of jurisdiction is not subject to waiver or forfeiture. *Id.*

Harris's jurisdictional claim was raised by collateral attack in a § 2255 motion. The government argued that such an attack must be supported by the two-pronged showing of cause of prejudice when the issue is not appropriately raised by objection at trial. *Id.* at 1307. However, the Eleventh Circuit, in its reversal and remand of petitioner's appeal from the denial of his § 2255 petition, emphasized that errors of constitutional proportion such as jurisdiction and the court's power to render judgment are ones that should not be subjected to the normal "cause" and "prejudice" standards because they are ones that cannot be defaulted. *Id.* at 1308. The court cannot derive power from the acts of parties to the case, either by consent or by default. *Id.*

The court found the jurisdictional claim to be so compelling that it suspended the normal requirements and moved to the issue of jurisdiction based upon its independent obligation to assure itself of proper subject matter jurisdiction. *Id.* at 1308. Finding that the court lacked jurisdiction, the court of appeals reversed the sentence and remanded for re-sentencing. *Id.* at 1309.

The *Harris* court cited similar authority in the Seventh Circuit, noting *Kelly v. United States*, 29 F.3d 1107 (7th Cir. 1994), for the same proposition. Normally, the *Kelly* court noted, "[t]he point of [requiring a petitioner to show] cause and prejudice, we repeat, is to overcome the waiver. But this analysis of course assumes that the error in question is a waivable one. And *jurisdictional defects are not*." *Id.* at 1112 (emphasis added).

A court at any stage can raise the issue of lack of subject matter jurisdiction *sua sponte*. This rule is "inflexible and without exception" and requires a court "to deny its jurisdiction and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guiinee*, 456 U.S. 694, 702 (1982). "A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking*." *Id.* at 1251 (emphasis added).

"Lack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a federal court by consent, *inaction*, or stipulation." *Id.* at 1251 (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)) (emphasis added). This review is particularly important where the situs of the offense is an element of the crime. *See United States v. Begay*, 42 F.3d 486, 498 (9th Cir. 1994).

In reality, Mr. Ebeck's claim that the court lacked subject matter jurisdiction is even more compelling than that presented in *Harris*. In the case at bar, the United States did not have exclusive or concurrent jurisdiction over the site of the alleged crime. Mr. Ebeck would respectfully

note that neither the government nor any court before which Mr. Ebeck entered his plea of guilty, has inquired into the jurisdictional issue. In short, a specific statutory element is missing: The crime must be committed on land within the criminal jurisdiction of the United States. This fact, standing alone, should warrant Mr. Ebeck an opportunity to file a petition pursuant to § 2241 so that the merits of his claim can be evaluated and determine what appropriate relief is due to Mr. Ebeck.

In its Brief in Opposition, the Government cites to language in § 2241 which authorizes a federal court to issue a writ of habeas corpus to federal or state prisoners who are in custody in violation of the Constitution or laws or treaties of the United States. Mr. Ebeck's conviction and sentencing resulted in violations of his constitutional rights under the Due Process Clause of the Fifth Amendment in that he is actually innocent of the specific federal offense for which he pled guilty. This further supports Mr. Ebeck's argument that 28 U.S.C. § 2241 is an appropriate avenue of relief. His claim is an example of the circumstance for which the court's equitable powers under the miscarriage of justice rule should be invoked to permit petitioner to prove his factual innocence.

According to the dictates of the habeas corpus statutes, a court is directed to determine the facts and to "dispose of the matter as law and *justice* require." 28 U.S.C. § 2243 (emphasis added). "The character of respondent's constitutional claim should be central to an evaluation of his habeas corpus petition." *Murray v. Carrier*, 477 U.S. 478, 498 (1986). This Court has continually affirmed this principle and held that a petitioner who can demonstrate his factual innocence can overcome procedural defaults because the unjust and wrongful detention of one

who is actually innocent of the crime for which he is incarcerated constitutes a fundamental miscarriage of justice. *Bousley v. United States*, 523 U.S. 614, 623. *See also Murray v. Carrier*, supra; *Bunkley v. Florida*, 123 S. Ct. 2020, 2023 (2003). (This Court held that when a defendant did not meet a statutory requirement to be found guilty, the conviction did not satisfy the strictures of the Due Process Clause.)

In *Bousley*, the petitioner encountered procedural hurdles in that he attempted to raise certain issues on collateral attack that were not first addressed on direct appeal. *Id.* at 621. The petitioner failed to raise the issue of his involuntary and unintelligent guilty plea which was procured due to erroneous advice regarding the proper interpretation of the "use" prong of 18 U.S.C. § 924(c). *Id.* This Court held that "although th[e] claim was procedurally defaulted, petitioner may be entitled to a hearing on the merits of it if he makes the necessary showing of actual innocence to relieve the default." *Id.*

Similarly, in *Murray v. Carrier*, this Court emphasized the federal court's habeas power to look past ordinary procedural requirements in the extraordinary case where a constitutional error has probably resulted in the conviction of one who is actually innocent. *Id.* (where this Court reversed the Court of Appeals' determination that petitioner had properly shown the requisite "cause" and "prejudice" to overcome procedural default, but permitting petitioner an opportunity to prove his claim of "actual innocence"). The doctrine of a court's "equitable discretion" should prevail and permit at least some court to reach the merits of the petitioner's claim when one is actually innocent of a charge and is being held in the custody of the federal government. *Id.* There are appropriate cases where "the principles of comity and finality that inform the

concepts of cause and prejudice 'must yield to the imperative of correcting fundamentally unjust incarceration.'" *Id.* at 495. "Convictions [ ] totally devoid of evidentiary support violate due process." *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969).

In *Murray,* Justice Stevens opined that there must be a searching consideration of the petitioner's claim and an "overall inquiry into justice." *Id.* at 515. He further noted that "it is equally clear that the prisoner must always have some opportunity to reopen his case if he can make a sufficient showing that he is the victim of a fundamental miscarriage of justice." *Id.* at 495. "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.* (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). At times, procedural standards must yield to "the imperative of correcting a fundamentally unjust incarceration." *Id.* (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

In *Triestman v. United States*, the Eleventh Circuit Court of Appeals specifically addressed whether a claim of actual innocence satisfied a petitioner's burden of showing that 28 U.S.C. § 2255 was "inadequate and ineffective." The court noted that, in regard to the gatekeeping requirement, "courts have yet to articulate the scope and meaning of 'inadequate and ineffective.'" *Triestman v. United States*, 124 F.3d 361, 377 (11th Cir. 1997). The court held that the scope and meaning of "inadequate and ineffective" is, "at the least, the set of cases in which the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions." *Id.*

In reaching its conclusion, the Eleventh Circuit quoted this Court's opinion in *Medina v. California*, 505 U.S. 437, 445 (1992) that "a procedural limitation 'is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* The question posed before this Court would further define the limits of the lower courts in exercising their power authorized by 28 U.S.C. § 2241.

In its Brief in Opposition, the Government focused primarily on Mr. Ebeck's failure to raise his claim in the filing of his first § 2255. However, the facts of Mr. Ebeck's case are unusual as the claim is based on the sentencing court's lack of subject matter jurisdiction. This distinction is crucial. *Murray* and *Bousley*, both cases from this Court, stand for a fundamental premise that surpasses the strictures of procedure: A person should not be allowed to remain incarcerated when it is apparent from the record that the sentencing court never had subject matter jurisdiction. It is for this proposition that Mr. Ebeck cited *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001) and *Calcano-Martinez v. Immigration and Naturalization Service*, 533 U.S. 348 (2001).

Mr. Ebeck has claimed that he is factually innocent of the crime. The lower court did not grant his petition pursuant to § 2241, finding that his claim was one of legal insufficiency, rather than one of actual innocence. On this basis, the lower court treated Mr. Ebeck's petition as one that was actually a "second" or "successive" § 2255 petition. Therefore, Mr. Ebeck was denied relief. The merits of this issue are also important, in that had the court found Mr. Ebeck's claim one of factual innocence, the court could have allowed him to rely on § 2241 as an avenue of relief.

Proper subject matter jurisdiction as granted by Article III of the United States Constitution is so fundamental that it can never be waived. Section 2241 was enacted so that petitioners can obtain relief when they suffer from an egregious constitutional injustice. The sentencing court in Mr. Ebeck's case did not have subject matter jurisdiction, thereby making his detention illegal, not only because it was imposed by the court without authority, but also because it renders him factually innocent of federal kidnaping as charged.

CONCLUSION

Mr. Ebeck's claim is based on the fact that he is factually innocent of federal kidnaping as defined by 18 U.S.C. § 1201(a)(2). Because subject matter jurisdiction cannot be procedurally defaulted, Mr. Ebeck should be allowed to bring his claim pursuant to 28 U.S.C. § 2241. Mr. Ebeck respectfully requests that this Court grant his Petition for Writ of Certiorari. Mr. Ebeck would also respectfully request that this Court reverse the decision of the Eighth Circuit and remand with directions to permit him to proceed with his claim through a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241.

Respectfully submitted,

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